

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 17, 2016

v

ALEX THOMAS KLEINERT,
Defendant-Appellant.

No. 326356
Iosco Circuit Court
LC No. 14-008512-FC

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Alex Thomas Kleinert, appeals by right his jury conviction of first-degree criminal sexual conduct. MCL 750.520b(2)(b). The trial court sentenced Kleinert to serve 25 to 50 years in prison for his conviction. Because Kleinert has not identified any errors warranting a new trial, we affirm.

The 12-year-old complainant testified that Kleinert digitally penetrated her in her father's house while they were lying on a couch watching television. Others were present at the time, including the complainant's sister, who was dating Kleinert and was asleep on the couch. The complainant reported the incident to her grandmother who then called the police department.

Kleinert's sole argument is that he was denied the effective assistance of counsel. Specifically, he argues that his trial lawyer's failure to oppose the admission of evidence that Kleinert had engaged in inappropriate sexual acts with another minor amounted to ineffective assistance that prejudiced his trial. Because the trial court did not hold an evidentiary hearing on this claim of error, our "review is limited to mistakes apparent from the record." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

A criminal defendant has the right to effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). "To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012) (quotation marks and citation omitted), remanded for resentencing 493 Mich 864.

“In cases involving the sexual abuse of minors, MCL 768.27a . . . allows the admission of other-acts evidence to demonstrate the likelihood of a defendant’s criminal sexual behavior towards other minors.” *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007). MCL 768.27a(1) provides in pertinent part that “in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. . . .” Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Evidence presented under MCL 768.27a is still subject to possible exclusion under MRE 403. *People v Watkins*, 491 Mich 450, 486; 818 NW2d 296 (2012). The *Watkins* Court provided a list of factors to consider when evaluating whether evidence otherwise permitted under MCL 768.27a should be excluded under MRE 403:

(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant’s and the defendant’s testimony. . . . [*Id.* at 487-488.]

The other acts witness testified that Kleinert had sexual relations with her when she was 15 years old and was babysitting for him and his wife. She also stated that Kleinert’s wife was home while she was kissing him. Thus, both the other-acts witness and the complainant were underage when Kleinert engaged in sexual contact with them. Further, the intimate contact occurred in both cases in the presence of close family members. The other acts evidence was relevant under MRE 401 to establish that Kleinert has a propensity to sexually assault underage girls and would not hesitate to do so even when others are in the home. Further, Kleinert’s sexual relations with the other-acts witness when she was 15 years old implicate one or more listed offenses. See MCL 768.27a(2); MCL 28.722.

As for MRE 403, the probative value of the other acts evidence was high, especially in light of Kleinert’s general denial that the events occurred and the lack of substantive physical evidence. The circumstances of the two events discussed above establish a strong similarity between the two situations, which in turn leads to a reasonable conclusion that Kleinert committed the charged crime. See *Pattison*, 276 Mich App at 620 (describing MCL 768.27a as reflecting “the Legislature’s policy decision that, in certain cases, juries should have the opportunity to weigh a defendant’s behavioral history and view the case’s facts in the larger context that the defendant’s background affords”). Additionally, the other acts evidence was not substantially outweighed by the danger of unfair prejudice. The prejudice inherent in this evidence is the reason why it is relevant. The evidence does not confuse the issues or mislead the jury, MRE 403, but rather clarifies the circumstances and helps the jury understand and process the evidence in its entirety.

Moreover, the jury was specifically instructed on how to approach the other acts evidence:

The prosecution has introduced evidence of claimed acts of sexual misconduct by the defendant with a minor for which he is not on trial. . . . If you find that the defendant did commit those acts, you may consider them in deciding if defendant committed the offense for which he is now on trial. You must not convict the defendant here solely because you think he's guilty of other bad conduct. . . .

Juries are presumed to follow a trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Kleinert's trial lawyer cannot be faulted for failing to oppose the admission of this evidence because any objection would have been futile. See *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (stating that ineffective assistance of counsel cannot be predicated on the fact that counsel did not raise a meritless objection).

The trial court properly admitted the testimony and Kleinert's lawyer was not ineffective for failing to oppose its admission.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Michael J. Kelly